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SUPREME COURT, U. S.

No. 488

In The

Supreme Court of the United States

October Term, 1952

THE COLLEGE BOOK EQUIPMENT COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA and
THE TARIFF COMMISSION,
Appellees.

On Appeal From the United States District Court
for the Northern District of New York

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

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In The

Supreme Court of the United States

October Term, 1952

No. 488

THE CALLANAN ROAD IMPROVEMENT COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the Northern District of New York

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BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

I. INTRODUCTION

Pursuant to the provisions of Rule 7, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellant, The Callanan Road Improvement Company, opposes the joint motion to affirm of the United States

of America and Interstate Commerce Commission and a similar motion of Cornell Steamboat Company, an intervening defendant. In the jurisdictional statement and its assignment of errors appellant has specified five principal points wherein the District Court committed error. The questions of law which appellant contends are substantial, five in number, were set forth in its statement as to jurisdiction and filed as a part of the appeal herein. For the purpose of this brief in opposition to the motions to affirm, the questions raised by the appeal will be restated in the same order as appeared in appellant's jurisdictional statement.

II. THE INTERSTATE COMMERCE COMMISSION MAY NOT MODIFY OR PARTIALLY REVOKE A CERTIFICATE ISSUED TO A WATER CARRIER BY INCORPORATING IN SAID CERTIFICATE BY REFERENCE OR OTHERWISE A CLASSIFICATION OF WATER CARRIERS

Appellant's certificate, which it acquired from its predecessor in interest, Joseph R. Hutton, permits it to operate as a common carrier by water in interstate or foreign commerce, by self-propelled vessels and by non-self propelled vessels with the use of separate towing vessels. This certificate, in its present form, was reissued to appellant's predecessor in interest by the Commission on March 7, 1944.[1]

The Commission's order complained of herein prohibits the use of shippers' barges by appellant on the theory that the manner of use of these barges by appellant constitutes towage, a classification of water carrier service

[1] The earlier certificate issued by the Commission to appellant's predecessor in interest was dated July 17, 1942 and was later cancelled and revoked by the Commission without notice to appellant's predecessor.

which the Commission has made. This classification does not appear in appellant's certificate nor does the certificate contain reference to it. Under these circumstances, appellant has contended that the Commission is without authority to incorporate, by interpretation or otherwise, one of its orders or decisions in an outstanding certificate because to do so would constitute a modification or revocation of a certificate issued to a water carrier, and this the Commission is not legally authorized to do.

The United States and the Commission in their joint motion state merely that appellant's certificate was issued to it in 1947.[2] The United States and the Commission contend that a partial modification or revocation of appellant's certificate has not resulted because the Commission has held that water carriers whose certificates do not specifically authorize towage are without authority to engage in such service. This contention ignores the position of appellant. The question is whether or not the classification of water carriers which it is contended the Commission has made may be incorporated in a water carrier certificate. Appellant is aware of the finding of the Commission in the *Campbell* case as to the distinction between towage and freighting, but that decision can have no application to appellant's certificate for the reason that the decision is not incorporated by reference or otherwise in appellant's certificate.

The District Court, although the question was urged at length by appellant below, did not pass on this contention. The District Court held that the Commission is authorized to classify water carriers under section 304(c) of the Interstate Commerce Act. The relation of the classification of water carriers to a certificate of a water

carrier, however, is the question for decision and not the authority of the Commission to make the classification in the first instance.

As will be explained later herein, the Commission may not modify, revoke or suspend a certificate issued under part III of the Interstate Commerce Act to a water carrier as it may in the case of a certificate issued to a motor carrier under part II of the Interstate Commerce Act. This very definite limitation on the part of the Commission to directly revoke or modify a certificate should not be permitted by indirect means such as the incorporation by interpretation of a classification of water carriers which has the effect of restricting the type of service a water carrier may perform or the method or manner in which the water carrier may operate.

The Commission has been most careful in its regulation of motor carriers under part II of the Interstate Commerce Act not to revoke or modify certificates by incorporation of classifications, decisions or orders. The Commission has exercised caution in this regard even though under part II of the Interstate Commerce Act it has specific authority to revoke a motor carrier certificate. An example of the Commission's caution in regulating the affairs of motor carriers appears in its decision in *Coastal Tank Line, Inc.* v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289. This case involved the sole question of whether the Commission could incorporate its order classifying motor carriers in a certificate held by Charlton Bros. which would have the effect of restricting or modifying the certificate authorized therein. The certificate of Charlton Bros. authorized it to transport general commodities with certain named exceptions. The named exceptions did not include the transportation of commodities in bulk. Years after the certificate was issued to Charlton Bros. it commenced for the first time the transportation of petroleum products, in bulk, in tank trucks. A com-

plaint was immediately filed against Charlton Bros. by a carrier of petroleum products in tank trucks alleging in substance that Charlton Bros. should not be permitted to transport petroleum products in tank trucks because it had never done so in the past. In defense of this transportation Charlton Bros. relied solely on its certificate. In reply to this position the complainant contended that the Commission's decision in *Classification of Motor Carriers of Property*, 2 M.C.C. 703, should govern and take precedence over the actual terms of the certificate. Charlton Bros. countered with the contention that this policy would amount to a partial revocation of its certificate. In the *Charlton Bros.* case the Commission held unequivocally that:

> "The definitions of commodity groups in the *Classification* case hardly can have greater significance *when they are not referred to in the certificate.*" (Page 305). (Emphasis supplied)

In the *Charlton Bros.* case the Commission recognized specifically that when the certificate was originally issued to the defendant its right to transport petroleum products in bulk should have been excluded since there was no evidence that the defendant had engaged in this type of transportation before the "grandfather" period. The Commission concluded, however, that since petroleum products in bulk were not excluded it could not do so at a later date by interpretation because a modification of the certificate would result (48 M.C.C. 302).

Appellant does not question the right of the Commission to classify water carriers under section 304(c) of the act which the District Court held the Commission could do. Appellant does contend, however, that once a certificate is issued to a water carrier which does not within its four corners contain a reference to a classification of water carriers that the Commission may not at a later date incorporate by interpretation or otherwise such a

classification which would have the effect of partial modification or revocation of the certificate. The District Court did not pass on the question but merely limited its consideration to the right of the Commission to classify water carriers. The question for decision goes a step further than the District Court's opinion and it is for that reason that appellant respectively submits that the question is of a critical importance to water carriers generally. If this question is left in its present unanswered or unsettled state, the Commission will be at liberty to make other classifications of water carriers in the future and to apply those classifications on the same basis as it has here, namely, if an outstanding certificate did not specifically authorize a classified type of service then under those circumstances the holder would not be permitted to render the service in question. Appellant respectfully contends that no clearer case of modification or revocation of a certificate of a water carrier could be created.

The motion of Cornell Steamboat Corporation in reply to the first point of appellant does not deal with the point of incorporation of classification of water carriers in a certificate. Instead, the motion of Cornell Steamboat Corporation deals generally with the proceedings of the Commission where the distinction between freighting and towage had been established. Again appellant states that such a difference has been established by the Commission but the critical point is that this difference, although established as a classification matter must be incorporated in a certificate.

III. THE COMMISSION IS NOT AUTHORIZED U THE INTERSTATE COMMERCE ACT TO SP CIFY THE SERVICE TO BE RENDERED BY WATER CARRIER OR THE TYPE OF EQUI MENT TO BE USED BY SUCH CARRIER

The District Court, after concluding that the Commi mission is authorized under the Interstate Commerce A to classify water carriers,[3] held that such classificatio would not amount to a regulation of "the details of ser ice" (107 Fed. Supp. 185 at 189). In the appellant statement as to jurisdiction and in its assignment of e rors it is contended that the District Court erred in fai ing to hold that the Commission's order of October 1 1951 as affirmed by order dated March 17, 1952 does i fact constitute an effort on the part of the Commissio to specify the service to be rendered by a water carrie

The United States and the Commission in their join motion contend that water carriers do not all perform th same type of service and that a carrier should not be per mitted to engage in any and all types of service. Corne Steamboat Company contends that section 309(d) of th act permits the Commission to limit the service to b rendered under a certificate issued to a water carrier This contention, as will presently appear, is in conflic with the clear holding of this Court in *United States* v *Seatrain Lines*, 329 U. S. 424.

The answer to the question of whether or not the Com mission may specify the type of service a water carrier may or may not carry on is not only found in the Inter state Commerce Act applicable to water carriers but also

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[3] As noted under the preceding heading, however, the District Court failed to answer the question as to whether the Commission could incorporate a classification of water carriers in a certificate where the certificate did not contain specific reference to the classi- fication.

in the opinion of this Court in the *Seatrain* case, *supra*. Section 309(d) of the act applicable to *water* carriers provides that the Commission may specify the route or routes over which, or the ports to or from which a water carrier may be authorized to operate. The same section prohibits the imposition of any term, condition or limitation as shall restrict the right of a carrier to add to its equipment, facilities or service within the scope of its certificate as the development of its business and the requirements of the public shall require. The same or similar provisions are contained in section 208(a) of the Interstate Commerce Act applicable to *motor* carriers. However, under section 208(a) which is practically word for word with section 309(d), the Commission is required to specify the service to be rendered in a certificate issued to a motor carrier, whereas that authority or requirement is missing in section 309(d).

In the *Seatrain* case this Court passed on the question of whether the Commission could specify the service to be rendered by a *water* carrier. In the *Seatrain* case, as in this case, one of the questions was whether or not the Commission could confine a water carrier to a particular type or classification of service, i.e., a "car-ferry service." The same type of question is presented in this case as to whether the Commission may confine the appellant to a freighting operation. The Commission contended that it could regulate the details of Seatrain's service under the provisions of section 309(d) to fix terms, conditions and limitations. This Court in the *Seatrain* case expressed doubt that the Commission could under this authority have imposed a restriction in the original certificate of Seatrain as to the type of service it could have utilized to serve its shippers best. In expressing this doubt this Court, speaking through Mr. Justice Black, said that it is of significance that the Commission is not empowered to grant a certificate to a

water carrier which specifies the service to be rendered. The authority of the Commission under part II of the act applicable to *motor* carriers to specify the service to be rendered was particularly referred to in the comparison of the separate parts of the Interstate Commerce Act.

The *Seatrain* case, as noted, involved a particular type of service which the Commission had said did not come within the meaning of general common carriers by water, more particularly, car-ferry was held by the Commission to be a distinct type of operation. This type of an operation is as much a classification of a water carrier service as is the Commission's distinction between freighting and towing. Nevertheless, it was held by this Court in that case that the Commission could not specify the service to be rendered by a water carrier in attempting to differentiate between a car-ferry service and a general common carrier service, because of the absence in part III of the act of the right on the part of the Commission to specify the service to be rendered.

The first certificate issued to appellant's predecessor in interest on July 17, 1942 made no effort to specify the type of equipment the carrier could utilize. In the proceeding which it reopened on March 7, 1944, without notice, the Commission stated that the purpose of its action was to specify the type of vessels appellant's predecessor could use.

It is obvious that the absence of a valid limitation as to equipment in its certificate would permit the appellant to use the shippers' barges without regard to whether the use of these barges constituted a towage or freighting service. The subsidiary question is presented, therefore, as to whether the Commission may specify the equipment to be used by a water carrier. Both the Commission and the District Court failed to answer this question. It is the appellant's position that since the Commission may

not specify the *service* to be rendered in a certificate issued to a water carrier it necessarily follows that the Commission may not specify the equipment to be used by a water carrier.

It is clear from the decisions of this Court and of the Commission under Part II of the act that the right to specify the type of equipment to be used flows directly from the right to specify the service to be rendered. In *Crescent Express Lines* v. *United States*, 320 U. S. 401, it was contended by appellant that the Commission's action in restricting it to the use of certain types of equipment was contrary to the statute, illegal and unlawful. This case involved a motor carrier. In overruling the contention of the motor carrier this Court held that:

> "Since Section 308 requires the Commission to specify the service to be rendered, this could not be done without power to also specify the general type of vehicle to be used."

The *Crescent Express Lines* case is the one this Court referred to in the *Seatrain* case when it held that the Commission is not authorized to prescribe the service of water carriers as it might do with respect to motor carriers because of the Commission's lack of authority to regulate the details of the service of a water carrier.

The Commission has frequently recognized its right to specify the type of equipment a motor carrier might use under part II because of its right to specify the service to be rendered by a motor carrier. In *Nudelman Common Carrier Application*, 28 M.C.C. 91, the Commission restricted the carrier to sedan type of equipment; in *Miller Extension of Operations*, 21 M.C.C. 401, the Commission granted a certificate restricted to the use of tank trucks; in *Myers Common Carrier Application*, 23 M.C.C. 451, a certificate was restricted to the transportation of automobiles in drive-away service; in *Central Truck-*

Away System, Inc., 8 M.C.C. 275, the certificate was restricted to merchandise transported in motorcycle traffic cars, with panel bodies; in *Billy Baker, Common Carrier Application*, 24 M.C.C. 805, the authority granted was restricted to the use of dump trucks; in *Barrows Common Carrier Application*, 19 M.C.C. 179, the certificate was restricted to the transportation of not more than six passengers per trip; in *Mercer and Dunbar Common Carrier Application*, 13 M.C.C. 683, the certificate was restricted to the use of armored truck service; and in *Smoky Mountain Tours Company*, 27 M.C.C. 435, the carrier was prohibited from using open-top equipment. All of these restrictions were justified on the theory of the Commission to specify the service to be rendered by a motor carrier. Since the Commission does not have that right under part III, however, it necessarily follows that neither does it have the right to specify the equipment a water carrier might use.

The United States and the Commission in their joint motion referred to the general provisions of section 304(c) which section provides that the Commission may establish from time to time just and reasonable classifications of groups of carriers. This general authority is not a limitation on or curtailment of the provisions of section 309(d) of the act, which section is a counterpart of section 208(a) permitting the specification of service to be rendered in a motor carrier certificate. Section 304(c) has to do with the general powers and duties of the Commission, whereas section 309(d) has to do solely with certificates of public convenience and necessity and permits. Although the Commission is permitted to establish from time to time such just and reasonable classifications of groups of carriers under its general powers and duties, it is restricted in establishing rules, regulations and requirements to be observed by carriers so classified or grouped except only *after hearing* as is found necessary

or desirable in the public interest. Appellant respectfully submits that the Commission has not complied with the provisions of section 304(c) referred to by the United States and the Commission in their joint motion for the reason that the Commission has not, after hearing, established rules, regulations and requirements to be observed by carriers classified or grouped. Until this requirement is met, any effort on the part of the Commission to enforce rules and regulations as to groupings or classifications of carriers must necessarily fail. In this respect the holding of the District Court as to the power of the Commission to make the classification in question is clearly in error as any rule, regulation or requirement emanating therefrom cannot be enforced until after a hearing for that purpose.

Furthermore, it seems clear that the Commission should not be permitted to use its classification powers under section 304(c) as a substitution for the power to prescribe types of service which is not conferred under section 309(d). For instance, the Commission might well in the future make a distinction between a harbor operation and a line-haul operation of a water carrier and thereafter refuse to allow a water carrier to engage in either or both types of operation. This type of restriction in service was attempted in the *Seatrain* case; has been enforced in this case and might well be attempted or enforced in the future. These are the reasons why appellant has contended in its statement as to jurisdiction that this point, as well as the others, presents a substantial question of importance to the water carrier industry generally.

IV. THE INTERSTATE COMMERCE COMMISSION MAY NOT SUSPEND, REVOKE, MODIFY OR ALTER A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY ISSUED TO A WATER CARRIER UNDER PART III OF THE INTERSTATE COMMERCE ACT

Appellant has contended in its statement as to jurisdiction that the Interstate Commerce Commission may not revoke a certificate issued to a water carrier under part III of the act. When this point was presented to the District Court, it held that "it would seem that the Commission might act in any event to correct a certificate having the obvious legal ambiguity of the first Hutton certificate" (107 Fed. Supp. 188). The District Court also concluded that since appellant's predecessor in interest did not object to the Commission's action in revoking the earlier certificate, the Commission could legally do what might otherwise be beyond the scope of its statutory authority. It is believed that these positions are clearly erroneous as a matter of law.

Joseph R. Hutton, appellant's predecessor in interest, was issued a certificate by the Commission dated July 17, 1942, authorizing operations as a common carrier within a described territory along the Hudson River, the New York State Barge Canal and the Niagara River, including the Oswego branch. This certificate did not specify the type of service to be rendered or the type of vessels to be used, nor was there any ambiguity or obscurity with respect to the broad scope of operation which it authorized. The certificate provided that it was to become effective and be in force from and after October 5, 1942. This certificate was issued to appellant's predecessor in interest after a full and complete hearing at which hearing counsel for certain intervening carriers as well as counsel for the Interstate Commerce

Commission appeared and participated. Counsel for the Interstate Commerce Commission did not challenge or question the findings of the Commission and the certificate of July 17, 1942 became effective and in full force after October 5, 1942. Thereafter and without notice to anyone, the Commission by order dated March 7, 1944 reopened the proceeding for reconsideration and simultaneously with the release of this order a report and amended certificate were issud by the Commission wherein the earlier certificate of appellant's predecessor was superseded and cancelled. The amended certificate of March 7, 1944 restricted the operations of appellant's predecessor to the use of self-propelled vessels and non-self-propelled vessels with the use of separate towing vessels. This is the action appellant complains of and this is the action which the District Court held the Commission could do to correct an "obvious legal ambiguity of the first Hutton certificate" and because Hutton "waived objection."

A similar contention was advanced by the Commission in the *Seatrain* case, *supra*. There it was argued that the Commission had the right to correct an "inadvertent error," patent on the face of the record. This Court held; however, that the Commission's action in the *Seatrain* case was not an "inadvertent error" but was for the purpose of executing a new policy which had been announced in *Re Foss Launch and Tug Company*, 260 I.C.C. 103. The procedural facts in this case are identical with those in the *Seatrain* case. In the *Seatrain* case the Commission issued a certificate permitting the transportation of general commodities without restriction between New York, N. Y., and New Orleans, La., and Texas City, Texas. In this case a similar certificate was issued to appellant's predecessor. On December 18, 1943 the Commission ruled for the first time in the *Foss Launch* case, *supra*, that a certificate to carry "commodities generally" did not authorize the carriage of loaded or unloaded

freight cars, a so-called car-ferry service. On December 14, 1943 the Commission ruled for the first time in the case of *Campbell Transportation Company Common Carrier Application* that "carriers whose certificates or permits do not specifically authorize the performance of towage are without authority to engage in such service." These two policy decisions were decided within four days of each other.

Immediately following its decision in the *Foss* case the Commission by order dated January 27, 1944 reopened the proceeding in the *Seatrain* case for hearing on the sole question of whether or not the earlier certificate should be modified so as to specifically authorize the applicant to operate as a common carrier in a so-called car-ferry service which the Commission had held in the *Foss* case not to be included under the authority of a certificate to carry commodities generally. In this case no such opportunity was offered to appellant's predecessor. The first notice appellant's predecessor had of the Commission's intent to modify his certificate was the release of the amended certificate which cancelled and superseded the earlier certificate. It would seem, therefore, that this difference in the matter of procedure in the two cases should make a sharp distinction as to the matter of protest which was made in the *Seatrain* case but which was not made in the case of appellant's predecessor. In the *Seatrain* case the Commission promptly proceeded to incorporate the distinction which it had made in its Foss decision so as to limit Seatrain's operations to a car-ferry service and a related operation. The same step was taken by the Commission with respect to the certificate of appellant's predecessor. In both cases the Commission's certificate had become effective.

This court held in the *Seatrain* case that the Commission was without authority to revoke the certificate issued by the Commission. It was stated that:

"The certificate, when finally granted and the time fixed for rehearing it has passed, is not subject to revocation in whole or in part except as specifically authorized by Congress." (329 U.S. 432-433)

If the certificate in the *Seatrain* case was not subject to revocation in whole or in part when the time for rehearing it had passed, certainly the certificate of appellant's predecessor was subject to the same statutory limitations as to the power of the Commission to revoke or modify it.

The District Court infers, however, that the earlier certificate of appellant's predecessor contained an "obvious legal ambiguity." It is respectfully submitted that there was no ambiguity in the earlier certificate as it described in clear and concise terms the scope and extent of the operation intended to be authorized. No question was raised concerning the certificate of appellant's predecessor until the Commission announced a new policy in the *Campbell* case where it was held for the first time that unless a certificate specifically authorized the performance of towage such a service could not be performed. This holding constituted a definite departure from an earlier holding in *Eastern Transportation Company*, 250 I.C.C. 505, 635, where the Commission held that special authority to tow shippers barges in the transportation of commodities generally under part III of the act was not necessary because authority would be granted authorizing the transportation of commodities generally by non-self-propelled vessels with the use of separate towing vessels. In the *Campbell* case the Commission reversed its policy announced in the *Eastern* case, just as in the *Seatrain* case the Commission was enforcing a new policy announced in the *Foss* case. The holding of this Court in the Seatrain case that "thus it seems apparent that the Seatrain proceedings were reopened not to correct a mere clerical error, but to execute a new policy announced in the Foss Case" is applicable here in that the only reason for the Commission's action in reopening the pro-

ceeding in the case of appellant's predecessor was to incorporate the new policy announced in the *Campbell* case. Under these circumstances it cannot be said that a legal ambiguity was involved in the first certificate of appellant's predecessor.

The District Court, as a second ground, upheld the Commission's action in revoking the certificate of appellant's predecessor because no objection was raised to this action. This finding poses the question as to whether or not the Commission may perform an act which it is not legally entitled to do under the statute if no objection is raised thereto by an interested party. Otherwise stated, can silence confer jurisdiction on the Commission where jurisdiction would not exist if a protest was raised. This Court held unequivocally and without qualification or reservation in the *Seatrain* case that the issuance of a certificate marks the end of a proceeding. When the certificate has been finally granted and the time for rehearing it has passed, it is not subject to revocation in whole or in part except as specifically authorized by Congress. Since Congress has not seen fit to authorize the Commission to revoke certificates,[4] that result may not be accomplished directly or indirectly, either with or without the consent of the certificate holder. The Commission has held that it is without authority to disturb a certificate issued to a wafer carrier once it has become effective. See *Detroit & Cleveland Navigation Company*, 265 I.C.C. 506.

The District Court seemed to give much weight to the fact that in the *Seatrain* case the carrier objected to the Commission's procedure whereas in this case no such ob-

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[4] In fact, the Commission through the Chairman of its legislative committee, the late Joseph B. Eastman, specifically disclaimed any desire for revocation authority under part III of the Act. See report of Senate Interstate and Foreign Commerce Committee on Bill S-2009.

jection was raised. The inference is that if objection is not raised the Commission can exercise authority which would be denied it in the event of objection. We cannot believe that this Court would require an affected party to complain in order to prevent the validating of an otherwise invalid act by the Commission.[5]

In any event, the procedural steps in the *Seatrain* case and in this case were quite different as to matters of notice and opportunity to be heard. In the *Seatrain* case, as noted, the Commission issued a notice calling "the attention of applicant therein * * * to the fact that the certificate issued probably does not properly describe the operations of Seatrain Lines, Inc. on and since January 1, 1940." This notice was followed by an order of January 27, 1944 stating the purpose of the further hearing so that the applicant would be put on notice. In this case, however, no such opportunity was afforded appellant's predecessor. Its first notice was the receipt of the amended certificate which cancelled and revoked the earlier certificate.

It is unreasonable to assume that applicant's predecessor, situated on the Hudson River, could have appreciated the distinction which the Commission was attempting to enforce. Certainly he had little, if any, opportunity to look into the matter when all water carrier services in coastwise operations were practically abandoned during World War II. Mr. Hutton's death followed in January, 1945 before the conclusion of the war. In any event the District Court seems to impose an obligation or duty on appellant's predecessor in spite of the fact that the Commission itself was unable to reach a definite position with

[5] Although the District Court also referred to the absence of any objection by the appellant at the time of the transfer of the Hutton certificate thereto; it seems clear that the appellant, without regard to any objection, acquired whatever rights existed under the certificate prior to the transfer.

respect to towage. As noted in the *Eastern* case the Commission held that separate towing authority was not necessary, whereas in the *Campbell* case the same body reversed its earlier decision and held to the contrary. Certainly a small Hudson River operator cannot be held accountable for his failure to understand and appreciate these technical distinctions.

The District Court seems to lay great stress on the fact that the Commission's action in revoking and cancelling the earlier Hutton certificate was justified on the theory that Hutton and his successors should not be allowed to operate in a manner after January 1, 1940 (the so-called grandfather date of the act) if the same type of service was not provided before that date. Nevertheless, this same theory was rejected by this Court in the *Seatrain* case. In the *Seatrain* case the Commission found on the basis of the evidence presented to it that the operations of the carrier prior to January 1, 1940 (the grandfather date) consisted of the operation of special type of equipment for carrrying property loaded in railroad cars. It was claimed that other types of operations had been conducted but the Commission found that the applicant had not at any time "handled freight in any manner other than in railroad cars loaded on its vessels with the exception of a small amount of liquid cargo handled in the tanks of the vessels with which they are especially equipped." The Commission further found "it is clear, so far as this record shows, that the commodities transported by applicant were loaded in railroad cars and handled between New York and New Orleans in non-break-bulk service by means of special type of equipment operated by it" (260 I.C.C. 434, 435).

Seatrain in the case before the Commission claimed that it had handled general commodities and had published and maintained the tariff schedules naming a full line of classification and commodity rates. In answer to

this argument the Commission held that "The mere fact that it participates in such tariffs do not establish that it handled freight by means other than in railroad cars." As to the operation between New York and Texas City referred to in the District Court's opinion, this service was instituted between January 1, 1940 and February 1, 1941, a so-called interim service which was allowed to be continued until an application for a certificate had been disposed or by the Commission. This operation, however, was carried on by the Seatrain type of vessel. The Commission held "the record amply supports the conclusion that the methods of operation between New York and Texas City were similar to those from New York to New Orleans" (Page 437). The Commission held specifically and unequivocally that

> "the record shows that in the transportation of commodities generally by self-propelled vessels, all traffic, other than liquid cargoes in bulk and empty railroad cars, handled by applicant, has been transported in railroad cars received from or delivered to rail carriers. Much emphasis was placed by applicant in the several proceedings before us upon the peculiar advantages of the through transportation made possible by its special type of vessel and operations. Applicant, according to the record, limited itself to that class of operations."

The Commission then concluded that

> "the authority granted clearly and specifically should cover the operations in which applicant was engaged on the 'grandfather date' are those instituted during the interim period. This is essential to preserve its position in the national transportation system. See *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475. *Crescent Express Lines, Inc.* v. *United States*, 320 U. S. 401 and cases cited therein" (260 I.C.C. 437).

The District Court placed much emphasis on the necessity of maintaining a parity between future and past operations of carriers subject to the jurisdiction of the

Commission. The District Court found as a matter of fact that appellant and its predecessor should not be allowed to engage in towage if such operations were not performed before the grandfather date. In making these findings, however, the District Court apparently confused the facts in the *Seatrain* case where the same identical result was accomplished in that Seatrain was permitted to engage in a vastly different operation after the grandfather date than it had engaged in before that date. In discussing the *Seatrain* case (107 Fed. Supp. 188) the District Court found that Seatrain had long been a common carrier by water. It had developed a distinctive type of service in ferrying freight cars received from railroads. The Court then held "But, and this is important, it also carried commodities generally." It is respectfully suggested that this finding is in error and it is plainly contrary to the undisputed evidence of record before the Commission. As previously pointed out, the Commission held that Seatrain had not in fact engaged in an operation before the grandfather date or during the interim period other than in a car-ferry service, and, because of this fact and in reliance upon the *Crescent Express Lines* case, (which the District Court also relied on) the Commission justified its action in restricting Seatrain's certificate for future operations to a car-ferry service. Appellant respectfully submits that the District Court has confused the facts in the *Seatrain* case as to the scope of that carrier's activity before the grandfather date. Seatrain Lines never performed a general commodity common carrier service other than in a railroad car-ferry operation which was held by the Commission in the *Foss* case to be a distinctive type of service. However, in spite of that fact Seatrain was authorized to indulge in a far greater scope of operations after the grandfather date than it had provided before that time under an act designed to preserve the parity of past and future operations which the District Court relied on in this case.

Once a certificate is issued it may not be recalled by the Commission and certainly it may not be recalled to invoke a new doctrine or policy. The fact that a certificate may authorize a broader scope of service for future operations than had been performed in the past as was done in the *Seatrain* case is no ground for revocation of the certificate except in the case of inadvertence, fraud or mistake. The matter of whether appellant's predecessor performed towage service as that term was eventually understood and described by the Commission before January 1, 1940 is therefore immaterial once the certificate had been issued.

Appellant respectfully urges that the District Court and the Commission have failed to follow and apply correctly the doctrine of the *Seatrain* case. There can be no doubt but that a certificate was issued after full and mature consideration on its part. There can be no doubt that the Commission changed its policy as to freighting versus towage and thereafter incorporated that policy in a new certificate. There can be no doubt that appellant's predecessor had no opportunity to protest this matter before the Commission acted, and thereafter, because of war conditions and the untimely death of appellant's predecessor no further opportunity was afforded. There can be no doubt that the District Court's fear as to parity of service in the future as in the past does not apply here since the same question was involved in the *Seatrain* case and overruled. For these reasons the Commission and the District Court have acted contrary to this Court's decision in the *Seatrain* case and probable jurisdiction should be noted by this Court for the purpose of correcting that error.

V. THE COMMISSION HAS FAILED TO COMPLY WITH THE PROVISIONS OF SECTION 8(b) OF THE ADMINISTRATIVE PROCEDURE ACT

Appellant has made certain contentions before the Commission in justification of its position. These contentions are (a) that the Commission may not specify the service to be rendered by a water carrier and the type of vessels such a carrier may use; (b) that the Commission may not revoke a certificate issued to a water carrier; (c) that the Commission may not by interpretation modify or partially revoke a certificate issued to a water carrier, and (d) that the Commission's order complained of by appellant amounts to a modification or revocation of the allowance provisions of section 314 of the act. The Commission did not see fit to pass on these questions but instead elected to confine its consideration of the matter before it to the question of whether or not appellant's activities on the Hudson River in fact constituted a towage service rather than a freighting service. The Commission made detailed findings of fact and conclusions as to this latter position, but it did not make similar findings of fact and conclusions as to the four points outlined above which were submitted by appellant for interpretation and consideration. Accordingly, this point was raised in appellant's complaint and presented to the District Court in support of its prayer for reversal of the Commission's order. The District Court held that the Commission's findings were "entirely adequate and complete, indeed praiseworthily so." These findings, however, dealt only with the single issue which the Commission chose to discuss in its report, i.e., the question of towage versus freighting. Appellant does not complain of the Commission's affirmative findings under this point. Instead its complaint is directed to the Commission's failure to make requested findings and conclusions on the other points.

Section 8(b) of the Administrative Procedure Act requires that decisions of administrative agencies shall contain findings and conclusions upon all material issues of fact, law or discretion presented on the record and the appropriate rule, order, sanction, relief or denial thereof. The failure of the Commission to apply this rule constitutes a violation of section 8(b) of the Administrative Procedure Act. In this regard it may be said that the District Court failed to make findings of fact and conclusions upon all of the issues of law and fact presented upon the record to it. In the case before the District Court appellant contended that the Commission's order complained of constitutes a revocation or modification of appellant's certificate as it now stands. This argument was advanced on the theory that appellant's certificate does not contain a reference by incorporation or otherwise of the Commission's order classifying water carriers. The District Court failed to pass on this question. Accordingly, the same omission is presented in its opinion as appellant complained of with regard to the Commission's report.

The District Court's opinion appears to be in conflict with the opinion of a Three-Judge Statutory Court in the case of *Atlanta and St. Andrew's Bay Rwy.* v. *United States*, 104 Fed. S. 193. In that case it was held specifically that section 8(b) of the Administrative Procedure Act is applicable to the Interstate Commerce Commission. In this case the District Court's decision overlooks the requirement that the Commission shall include a statement of findings and conclusions as well as the reasons or basis therefor upon all material issues of fact, law or discretion presented on the record. Under this provision the Commission has no alternative but to make these findings and conclusions, and its failure to do so conflicts with the provisions of section 8(b) of the Administrative Procedure Act.

VI: THE COMMISSION'S ORDER CONSTITUTES A REVOCATION OR MODIFICATION OF SECTION 314 OF THE INTERSTATE COMMERCE ACT

Section 314 of the Interstate Commerce Act states that if the owner of property transported by a water carrier directly or indirectly furnishes any service connected with such transportation or furnishes any instrumentality used therein, the charge or allowance therefor shall be published in tariffs or schedules as provided by part III of the act. Pursuant to these provisions appellant published certain allowance provisions in a tariff filed with the Commission applicable in instances where the shipper furnished a scow or barge for the transportation of its goods by appellant. This activity was defined by the Commission to constitute towage and not freighting. In its report the Commission laid down certain rules or regulations whereby a water carrier holding only freighting rights could use equipment furnished by a shipper. These rules are impossible of compliance by a water carrier such as appellant if the allowance provisions of the act are to be observed and because of this fact it is appellant's contention that the Commission has in effect modified or revoked the allowance provisions of section 314. In so doing, the Commission has established a rule of its own making and has preferred that rule to a provision of the Interstate Commerce Act.

The Commission has criticized the provisions of appellant's tariff because (1) appellant may not utilize the scows furnished by shippers on return movements, (2) that demurrage and free-time rules of appellant's tariff do not apply in instances where shipper furnished equipment, and the requirement that appellant must return the shipper's scow to the point of origin. These requirements are impossible of compliance by a carrier and shipper for the reason that it would be necessary for the

shipper to surrender complete control of the scow or barge to the carrier for use by the carrier as it saw fit. The only way these rules and regulations can be met by a carrier and shipper is for a charter or lease of equipment agreement to be entered into between the carrier and shipper and under those circumstances there would be no need or necessity for the application of the allowance provisions of the act. Otherwise stated, the Commission by its order will force or compel shippers and carriers to lease or charter equipment, which of course, is a very common practice.

Appellant submits that section 314 of the act has a very definite place in the regulatory scheme of transportation. Allowances have prevailed in the railroad field for years and years. In the regulation of that type of transportation the Commission has not attempted to create certain classes or types of operations which railroads may or may not perform and then prohibit the application of section 15 (13) of the act (the corresponding part of section 314) when railroads and shippers desire to avail themselves of the provisions of that section. In interpreting section 15(13) of the act this Court in the case of *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 41, 46-47, held that the only restriction of this section is that the carrier must pay the owner of instrumentalities furnished for its use an amount that is no more than reasonable, and the only permissive element is that the Commission may determine the maximum to be paid in case there is complaint. This Court held further that "As the carrier is required to furnish this part of the transportation upon request, he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it."

The Commission has stated that it is an agency of limited powers and authority; that these powers and au-

thorities do not extend beyond expressed enactment or its fairly implied inferences and that the power of the Commission should not be interpreted so as "to permit what in effect is a modification of a separate provision of the act" (See *Smith Bros. Revocation of Certificate*, 33 M.C.C. 465, 471).

There is no provision of section 314 that a water carrier must possess a certain type of certificate before the provisions of section 314 may be applied as between carrier and shipper. The plain matter of the fact is that the Commission made a distinction between towage and freighting without reckoning with the provisions of section 314 of the act and it now seeks to preserve that distinction even though to do so will nullify section 314.

VII. CONCLUSION

Appellant is gravely concerned with the Commission's order in this case as it constitutes the exercise of administrative action far in excess of statutory authority. The same basic principles, only more aggrieved, are presented in this case as were presented in the *Seatrain* case. The Commission has committed the same unauthorized acts in this case as were committed in the *Seatrain* case. In addition, the Commission has committed other violations either directly or indirectly.

This court has not had the occasion to pass on questions of the Commission's authority in regulating the affairs and operations of a water carrier since the *Seatrain* case. Appellant respectfully submits that an affirmance of the principles announced in that case is required at this time, for otherwise the Commission will be permitted to impose the same conclusions and results in the future as have been imposed in this case. The joint motion of the United States and the Interstate Commerce

Commission and the motion of Cornell Steamboat Company to affirm should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing reply brief was served upon counsel for the parties by mailing a true copy of said brief to such counsel this 12th day of December, 1952.

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